IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 11 of 2002

with

CIVIL APPLICATION NO. 562 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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GEETABEN D/O MAGANBHAI GULABBHAI NAIK

Versus

LALITABEN WD/O MAGANLAL GULABBHAI NAIK

Appearance:

MR A.R.MAJMUDAR for MR VH DESAI

for the Appellant

MR SUNIT S SHAH for the Respondents

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 26/04/2002

ORAL JUDGEMENT

Admitted. Mr. Sunit S Shah, learned advocate appears and waives service of notice of admission on

behalf of the respondents.

2. In the peculiar facts and circumstances of the case and in view of the statement made by Mr. Sunit S Shah, learned advocate for the respondents, with the consent of the learned advocates appearing for the parties, the matter is taken up for final hearing today and decided by this judgement.

3. In this Appeal from Order which is filed under Order 43 Rule 1(r) of the Code of Civil Procedure ('the Code' for short), appellant/original plaintiff seeks to challenge the order dated July 12, 2001 recorded below application Exhibit-5 in Special Civil Suit No. 108 of 2000 by the learned 5th Joint Civil Judge (SD), Surat, Camp at Bardoli by which application Exhibit-5 filed under Order 39 Rule 1 & 2 of the Code by the appellant against the respondents/original defendants restraining them from interfering in the joint possession of the appellant with the respondents on the property shown in para 2 of the application (suit property for short) and also to restrain them from transferring or alienating the suit property till disposal of the suit, came to be rejected.

4. The appellant has filed the suit for partition, possession and accounts of the suit property claiming that she is the joint owner of the suit property with the respondents. Along with the suit application Exhibit-5 is also moved wherein she has sought for temporary injunction claiming that she is in joint possession of the suit property with the respondents. In the said application it is prayed that the respondents be restrained from interfering in the joint possession of the appellant with the respondents on the suit property and also to restrain them from transferring or alienating the suit property. In the said application primafacie case and balance of convenience is pleaded and, therefore, prayed to grant injunction as prayed for therein.

5. The application Exhibit-5 is contested by the respondents by filing written objection inter alia claiming that the suit property is in exclusive ownership of respondent No.1 since 1965 and, therefore, respondent No.1 is in exclusive possession of the suit property and, therefore, there is no primafacie case in favour of the appellant nor balance of convenience tilt in her favour. It is, therefore, prayed to dismiss the application Exhibit-5.

6. The learned Judge of the lower Court after hearing the learned advocates appearing for the parties and on analysis, appreciation and evaluation of the pleadings and the documents, came to the conclusion that there is no primafacie case in favour of the appellant nor balance of convenience tilts in her favour since respondent No.1 is the exclusive owner of the suit property since 1965. Resultantly the learned Judge has dismissed the application Exhibit-5 which has given rise to the present Appeal from Order at the instance of the original plaintiff.

7. I have heard Mr. A.R.Majmudar, learned advocate for the appellant and Mr. Sunit S Shah, learned advocate for the respondents. I have perused the averments made in the memo of the appeal, grounds set out therein and the impugned order, which is subject matter of challenge in this Appeal from Order.

8. At the outset, Mr. Sunit S Shah, learned advocate for the respondents, upon instructions received from the respondents, more particularly from respondent No.1, states that respondents are not intending to transfer or alienate the suit property during the pendency of the suit.

9. In view of the aforesaid statement made by Mr. Sunit S Shah, learned advocate for the respondents, so far as the second prayer made in the application Exhibit-5 is concerned, it can be granted in favour of the appellant. So far as the first prayer with respect to restraining the respondents from use and enjoyment of joint possession of the appellant with the respondent No.1 is concerned, I am of the opinion that the appellant has failed to prove that she is in joint possession of the suit property with respondent No.1. So far as the finding recorded by the learned Judge of the lower Court in this regard is concerned, I am in complete agreement with the reasons given by the learned Judge and ultimate conclusion reached by him and, therefore, the said finding cannot be disturbed in this Appeal from Order. In view of this the first prayer made in the application Exhibit-5 cannot be granted whereas the second prayer with respect to restraining the respondents from transferring or alienating the suit property is concerned, deserves be granted and accordingly respondents are required to be restrained from transferring or alienating the suit property till disposal of the suit, hence Appeal from Order deserves to be partly allowed.

10. For the foregoing reasons, the Appeal from Order succeeds in part and is accordingly partly allowed with no order as to costs. The respondents are hereby restrained from transferring or alienating the suit property till disposal of the suit. So far as not granting the prayer by the learned Judge with respect to claiming the joint possession by the appellant with the respondents is concerned, is hereby upheld and confirmed.

11. In view of the order passed in the Appeal from Order, no order is required to be passed in Civil Application. Notice is discharged.

12. On the facts and in the circumstances emerging from the record of the case, the learned Judge of the lower Court is directed to dispose of the suit as early as possible, preferably on or before December 31, 2002 and in doing so regard shall also be had to the exigency of his files.

(A.M.Kapadia,J)

Jayanti*